Supreme Court, U.S.
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No. 98-___

In The

Supreme Court of the United States

October Term, 1998

ODILON CHACHA COTO, ET AL.,

Petitioners,

v.

J. RAY McDERMOTT, S.A., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal For The Fourth Circuit Of The State Of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Jones Act contains a provision, 46 U.S.C. § 688(b), which applies to certain actions by foreign nationals if the incident occurred while the person was in the employ of an enterprise engaged in oil and gas exploration or production and in the waters of a nation other than the United States. Section 688(b)'s prohibitory language provides that "no action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action . . . " Does this language in Section 688(b) preclude and prohibit claims filed in United States courts that are asserted under state law or foreign law by foreign nationals who were injured while in the employ of an enterprise engaged in oil and gas exploration or production and in the waters of a nation other than the United States?

2. Are claims described above that are asserted under state law or foreign law precluded under Section 688(b) on the grounds of federal maritime preemption?

PARTIES TO THE PROCEEDINGS BELOW

In addition to Petitioner Odilon Chacha Coto listed in the caption, Petitioners are Ediberto Hernandez Hernandez, Emedelio Hernandez Torres, Hector Rodriguez Gamas, Nelli Rodriguez Obando, Julian Perez Flores, Rumaido Mendez Vazquez, Saul Diaz Romero, Silvestre Avalas Aguilar, Jorge Lopez Meza, Mario Short Acosta, Luis Felipe Toache Ruiz, Pedro Rodrianez Berzunsa, Mario Arturo Martinez, Jose Antonio Vazquez Mota and Alejandro Canton Peralta.

In addition to Respondent J. Ray McDermott, S.A. listed in the caption, Respondents are McDermott International, Inc., McDermott Inc., J. Ray McDermott, Inc., Offshore Petroleum Divers, Inc., Gulf Technical Services Corporation, CCC Fabricaciones Y Construcciones S.A. De C.V. and Corporacion De Industrias Y Construcciones, S.A. De C.V.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Odilon Chacha Coto, et al., petition for a writ of certiorari to review the judgment of the Court of Appeal for the Fourth Circuit of the State of Louisiana in this case.

OPINIONS BELOW

The opinion of the Court of Appeal for the Fourth Circuit of the State of Louisiana, reported at 709 So.2d 1023, is reprinted at App. 1-15. The order of the court of appeal refusing rehearing is reprinted at App. 25. The order of the Supreme Court of the State of Louisiana denying application for writ of certiorari and/or review is reprinted at App. 26-27. The Civil District Court for the Parish of Orleans, State of Louisiana signed two judgments in this case. The civil district court's April 25, 1996, judgment is reprinted at App. 16-19. The civil district court's September 4, 1996, judgment is reprinted at App. 20-24.

JURISDICTION

The decision of the Court of Appeal for the Fourth Circuit was issued on March 18, 1998. Rehearing was refused by the court of appeal on April 30, 1998. The Supreme Court of the State of Louisiana denied application for writ of certiorari and/or review on October 16, 1998. This Court has jurisdiction to grant a writ of certiorari pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The statute involved in this case is 46 U.S.C. § 688(b), which is a part of the federal statute that extends to seamen the rights and remedies under FELA and is more commonly referred to as the "Jones Act." Section 688 reads in full as follows:

> (A) **Application of railway employee statutes; jurisdiction.** Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.
>
> (B) **Limitation for certain aliens; applicability in lieu of other remedy.** (1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent

resident alien of the United States at the time of the incident giving rise to the action, if the incident occurred –

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in Article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

STATEMENT OF THE CASE

Petitioners are citizens of the Republic of Mexico. They are surviving crew members or representatives of deceased crew members of the Derrick Lay Barge 269 ("DLB-269") which sank off the Yucatan Peninsula in the Bay of Campeche on Sunday, October 15, 1993, with approximately two hundred and fifty (250) persons aboard as crew, including a number of American citizens and Louisiana residents. At the time that the DLB-269 sank, the vessel was under the effects of Hurricane Roxanne and under tow of the tugs M/V Captain John and the M/V North Carolina.

Petitioners filed two lawsuits (which were subsequently consolidated) in the Civil District Court for the Parish of Orleans, State of Louisiana to recover damages "under the Jones Act and general maritime law, or alternatively under Louisiana law or other appropriate laws." Petitioners specifically pleaded that if the provisions of 46 U.S.C. Section 688(b) did apply to their claims, "plaintiffs alternatively show that this matter may nonetheless proceed in this Court, and that either Louisiana law or alternatively Mexican law would be applicable hereto."

Petitioners sued: a) J. Ray McDermott, S.A., a Panamian corporation which employed Petitioners and maintained an ownership interest in the DLB-269 and which has its principal place of business and executive business office in New Orleans; b) McDermott International, Inc., a Panamian corporation with its executive business office in New Orleans and which was involved in the operations of the DLB-269; c) CCC Fabricaciones Y Construcciones S.A. De C.V. and Corporacion De Industrias Y

Construcciones, S.A. De C.V., two Mexican corporations which were partial owners of the DLB-269 and which employed certain of the Petitioners; d) North Bank Towing Corp., a Louisiana corporation which owned the M/V Captain John; and e) Seabulk Offshore, Ltd., a Florida partnership which owned the M/V North Carolina.

By judgment signed April 25, 1996, the civil district court dismissed Petitioners' Jones Act and general maritime law claims pursuant to 46 U.S.C. § 688(b) for the reasons that (1) Petitioners were Mexican Nationals and non-resident aliens; (2) they were employed in an enterprise engaged in the exploration, development or production of offshore mineral or energy resources; (3) the enterprise was located on the outercontinental shelf of a nation other than the United States; and (4) Petitioners had a remedy under Mexican law in Mexico. *See* App. 18-19.

The civil district court did not rule, at that time, on Petitioners' causes of action asserted under Louisiana law and Mexican law stating:

> IT IS FURTHER ORDERED that the issue of whether the Mexican National Plaintiffs have any action under Louisiana law or other (Mexican) law which may be pursued in this Court is taken under submission by the Court.

App. 19.

By subsequent judgment signed on September 4, 1996, the civil district court dismissed with prejudice Petitioners' Louisiana law claims and dismissed Petitioners' Mexican law claims without prejudice to refiling same only in Mexico. *See* App. 23-24. The civil district

court stated in its second order that Petitioners' state and foreign law claims "would directly contradict that body of law as defined by Congress in § 688(b)." App. 22. Petitioners appealed this order dismissing their Louisiana and Mexican law claims and denying Petitioners the right to proceed in Louisiana courts. The court of appeal affirmed the civil district court judgment dismissing Petitioners' state and foreign law claims. App. 1-15.[1]

The court of appeal ultimately affirmed the trial court's dismissals of the foreign and state law claims on the bases of federal maritime preemption and alleged conflict with Section 688(b). The crux of the court of appeal's preemption analysis is the following statement:

> In this case, allowing the appellants' maritime tort claims, whether premised under state or foreign law, to proceed in state court would disrupt the "proper harmony" of maritime law as presently set forth in Section 688(b) and would materially prejudice the characteristics of the general maritime law.

App. 15.

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[1] Petitioners did not complain on appeal of the dismissal of their Jones Act and United States maritime claims under 46 U.S.C. § 688(b). Petitioners did complain of and contested the district court's subsequent dismissal of their Mexican law and Louisiana law claims pursuant to Section 688(b).

REASONS FOR GRANTING THE WRIT[2]

The court of appeal impermissibly transformed Section 688(b), a statute that is limited to specified causes of action that may be asserted by certain foreign nationals (those based on the Jones Act and United States maritime law), into a complete preemption of access to United States' courts by these individuals, even if their claims are based on foreign law or state law. Such a decision which completely denies access to United States courts by all persons in the same class as Petitioners cannot be justified by the express language of 46 U.S.C. § 688(b), federal maritime preemption, public policy grounds, or on any other basis.

The court of appeal's decision in this case flatly contradicts the express language of Section 688(b) which refers only to the Jones Act and United States maritime law and which makes no reference to claims asserted under foreign law or state law. The preemption analysis of the court of appeal ignores and directly conflicts with this Court's decision in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994). Section 688(b) represents a statutorily created choice of law/forum non conveniens mechanism applicable only to claims asserted by certain foreign seamen pursuant to the Jones Act or United States general maritime law. Such a procedural device cannot serve as predicate for applying federal maritime preemption. This

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[2] The identical issues presented by this petition are currently pending before the Texas Supreme Court. *See Stier v. Reading & Bates Corporation*, 1996 WL 490625 (Tex. App. – Houston [14th Dist.] August 29, 1996, application for writ of error granted March 26, 1998).

Court clearly held in *American Dredging Co. v. Miller* that procedural doctrines cannot be made the basis of federal maritime preemption arguments, when it ruled that the State of Louisiana's open court's doctrine, which prohibited application of forum non conveniens to claims brought in that state's courts, was not preempted by federal maritime law. *Id.* at 453.

46 U.S.C. § 688(b), states, in part, as follows:

> No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who is not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action, if the incident occurred – (A) while that person was in the employ of an enterprise engaged in the exploration, development or production of offshore mineral or energy resources. . . . ; and (B) in the territorial waters overlying the continental shelf of a nation other than the United States . . . [3]

The above statutory language is unambiguous and pertains *only* to an action based upon the Jones Act (FELA) or any other maritime law of the *United States*, when certain criteria are satisfied. The statute, by its express terms, *does not* preclude, prohibit, or preempt claims asserted under Louisiana state law or Mexican law. The statute makes no reference to any law other than

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[3] The "subsection (a)" referenced in Section 688(b) is the general provision in the Jones Act which provides and extends the federal remedies and rights available under the Federal Employer's Liability Act (FELA) to seamen.

(1) the Jones Act and (2) United States maritime law. If the statute had the intended effect of completely denying access to American courts by foreign seamen, Congress would have simply stated that no alien can file suit in any state or federal court of the United States for injuries resulting from drilling activities that occurred in foreign territorial waters. The statute does not so provide and is limited by its express terms to the Jones Act or other claims asserted under the maritime law of the United States.

Previous federal opinions which have examined Section 688(b) in depth have applied it to the two causes of action specifically referenced in the statute – (1) the Jones Act and (2) United States maritime law claims – and have not concluded that Section 688(b) constitutes a blanket prohibition against a foreign national maintaining claims in United States courts. Section 688(b) has been construed as a statutory choice of law provision and not as a jurisdictional statute intended to preclude foreign seamen from asserting their foreign law or state law claims in this country.[4]

The Fifth Circuit in *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1377-82 (5th Cir. 1988), held that

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[4] Many of these cases reflect a forum non conveniens analysis by the federal court once it determines that foreign substantive law should apply after application of conflict of law principles. Louisiana courts have no inherent or statutory authority to dismiss claims filed by foreign nationals on the basis of forum non conveniens. *See Lejano v. K.S. Bandak*, 705 So.2d 158, 165 (La. 1997), *cert. denied*, 119 S.Ct. 52 (1998); *Fox v. Board of Supervisors of LSU*, 576 So.2d 978, 991 (La. 1991); *Russell v. CSX Transportation, Inc.*, 689 So.2d 1354 (La. 1997).

688(b) barred the foreign seaman's Jones Act and United States maritime law claims, but then proceeded to conduct a forum non conveniens analysis with respect to plaintiffs' Texas state law claims.

In *Marriott v. Sedco Forex International Resources, Ltd.*, 827 F.Supp. 59 (D. Mass 1993), foreign seamen brought suit in the United States for claims which arose off the coast of India. The district court held that United States law did not apply to these claims. The court concluded that the claims of the foreign seamen should be addressed under Indian substantive law pursuant to choice of law/conflicts of law principles. *Id.* at 67. Because the court concluded that Indian substantive law should apply, it refused to reach defendants' 688(b) arguments that the Jones Act did not apply to such claims. *Id.* at 67, n. 10. The court recognized that Section 688(b) was only intended to preclude the Jones Act remedy and not foreign substantive law claims and proceeded to retain the Indian law claims and refused to dismiss on the grounds of forum non conveniens. *Id.* at 68-72.

In *Cuevas v. Reading & Bates Corp.*, 577 F.Supp. 462 (S.D. Texas, 1983), *aff'd*, 770 F.2d 1371 (5th Cir. 1985), the district court specifically addressed Section 688(b) (which had only recently been adopted at that time) and its intended purpose. The court studied the legislative history of Section 688(b) and concluded that Congress' intent had been only to codify existing authority relating to the application of *American* law through a traditional choice of law analysis. *Id.* at 469. The court concluded that the sole intent of the statute was to preclude the application of the maritime law of the United States to certain claims asserted by foreign nationals. The court

ultimately concluded that the law of the Philippines should be applied to the claims asserted in the case. *Id.* at 470.

Admiralty authority Professor David Robertson has recognized in numerous published articles that Section 688(b) is a statutory choice of law provision that was only intended to prevent foreign seamen from relying upon *American* law, and was not intended to abrogate a foreign seaman's access to United States courts or preclude a foreign seaman from asserting state law or foreign law causes of action in American courts.

> Three famous United States Supreme Court decisions (often called "the *Lauritzen* trilogy") provide a methodology for determining when *American* law applies to transnational cases involving injured seamen and similarly situated tort victims [citations omitted]. The 1982 amendment [§ 688(b)] to the Jones Act augments the law of the *Lauritzen* trilogy by severely limiting foreign offshore oil and gas workers access to *American* law. All of this *choice-of-law* apparatus is substantive federal law that binds the state court . . . 46 U.S.C. app. § 688(b) (1988) generally denies such workers access to *American* law except when it is shown that neither the worker's home county nor the place of injury provides any remedy.

David W. Robertson, *Admiralty and Maritime Litigation in State Court*, 55 La. L. Rev. 685, 729 and n. 259 (1995) (emphasis supplied). In a later article, Professor Robertson discussed Section 688(b) as follows:

> A 1982 amendment to the Jones Act made the Jones Act, as well as the general maritime

> law of the United States, no longer applicable to most injuries to alien workers engaged in oil and gas operations off the shores of foreign countries. See 46 U.S.C. app. § 688(b) (Supp. V 1987) . . . This provision takes away substantive causes of action but says nothing about the jurisdiction of the United States courts. *On its face it is a choice-of-law provision and has no direct bearing on forum non conveniens.* Most of the relevant decisions have treated it that way. [citations omitted.] *The legislative history, however, contains scattered statements characterizing the provision as designed to close United States courts to foreign offshore worker litigation.* The relevant legislative history is set forth in *Vaz Borralho v. Keydril Co.*, 710 F.2d 207, 210-12 (5th Cir. 1983). *These statements are not consistent with the provision's language.*

David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937, 975, n. 56 (1990) (emphasis supplied).

There are numerous cases which thoroughly discuss and correctly recognize that a court (federal or state) which is vested with admiralty jurisdiction will, in appropriate circumstances, apply foreign substantive law to adjudicate a plaintiff's claim. Examples include:

1. *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 53 (2nd Cir. 1991) ("Rather, under *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed 1254 (1953), another nation's contacts with a particular event may be so great as to warrant the application of the law of that nation, even if jurisdiction has properly been asserted in federal court on the basis of

admiralty. *See Bilyk v. Vessel Nair*, 754 F.2d 1541, 1543-45 (9th Cir. 1985) (applying *Lauritzen*).")

2. *Sosa v. M/V Lago Izabal*, 736 F.2d 1028, 1031 (5th Cir. 1984) ("Sosa was injured on navigable water in connection with the navigation of the M/V LAGO IZABAL; admiralty jurisdiction is present. Consequently, the only issue is whether the district court should have applied American or foreign maritime law.")

3. *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159, 1161 (5th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987) ("The district court correctly determined that Australian law applied to Schexnider's suit. The determination of the law governing this maritime action is made pursuant to [*Lauritzen – Rhoditis* factors]").

4. *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166, 181, n. 11 (3rd Cir. 1995) ("If the plaintiff has also pled in the alternative the applicability of foreign law . . . the court may of course adjudicate any such claims over which there is a basis for subject matter jurisdiction. Where the locality and maritime connection tests are met . . . 28 U.S.C. § 1333 will provide such a basis. We note also that some courts have not required a plaintiff affirmatively to plead the applicability of foreign law at the outset, but instead have applied foreign law after concluding that American law does not apply.")

5. *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995)

Because Section 688(b) expressly precludes application of the Jones Act or United States maritime law, a court should simply proceed to adjudicate the foreign national's claim under foreign or state law or dismiss for forum non conveniens if that procedural doctrine is available to the court. *See Oil Shipping v. Sonmez Denizcilik Ve Ticaret, A.S.*, 10 F.3d 1015, 1019 (3rd Cir. 1993) (foregoing *Lauritzen* choice of law analysis in maritime case where statute dictates choice of law applicable to dispute).

It is obvious that Section 688(b), by its express terms, does not preclude maintenance of Petitioners' foreign and state law claims in Louisiana courts. And, such foreign and state law claims are not barred in United States' courts by Section 688(b) under any application of federal maritime preemption.

The court of appeal admits that Section 688(b) is either a codification of choice of law or forum non conveniens principles. App. 8. Both doctrines are undisputably procedural mechanisms.[5] The fact that forum non conveniens is a procedural doctrine rather than a substantive one was at the crux of the reasoning of this Court in *American Dredging Company v. Miller, supra*, when it held that United States' maritime law did not preempt Louisiana forum non conveniens. 510 U.S. at 453-54. This Court rejected federal maritime preemption of Louisiana forum non conveniens law in that case precisely because forum non conveniens is procedural doctrine, not a substantive one. *Id.* Since Section 688(b) represents a procedural

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[5] The court of appeal states that "the device of forum non conveniens is a procedural rule of the common law." App. 6, n. 5.

mechanism applicable only to claims asserted pursuant to the Jones Act and United States maritime law, the court of appeal's reasoning in this case and affirmance of the dismissal of Petitioners' foreign law and state law claims are flawed and erroneous for the identical reasons expressed by this Court in *American Dredging Co. v. Miller*.

Even if a plausible argument can be made that Petitioners' Louisiana law and Mexican law claims conflict with Section 688(b) in some way, *American Dredging* expressly recognized that the requirement of uniformity in maritime or admiralty cases is not absolute. *Id.* at 451. State or foreign laws are not preempted by federal maritime law where they conflict with a rule of maritime law which itself does not require uniformity. *Id.* citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-74 (1959). The *American Dredging* court rejected maritime preemption of state forum non conveniens because the doctrine was procedural rather than substantive *and* because it was "most unlikely to produce uniform results." *Id.* at 453.

Similarly, Section 688(b) does not produce uniform results and cannot serve as a predicate for application of federal maritime preemption. There are several categories of foreign seamen that continue to be entitled to litigate Jones Act and general maritime lawsuits in the United States despite Section 688(b). A foreign seaman who was injured on the outercontinental shelf of another country, but was not engaged in oil production or related activities, is not barred by Section 688(b) from bringing his claims in United States courts. Likewise, blue water foreign seamen engaged in oil and gas activities who are injured at a location other than the outercontinental shelf

of a foreign country are not barred by Section 688(b) from asserting Jones Act or United States maritime law claims in United States courts. Even a foreign seaman injured on the outercontinental shelf of a foreign country who was engaged in oil production may assert claims in United States courts if that person has no remedy in the foreign jurisdiction. Since Section 688(b) and the maintenance of claims by foreign seamen in United States courts are not and cannot be uniform, there is nothing about maintenance of this suit by Petitioners in Louisiana courts under state law or foreign law that prejudices the uniformity of United States maritime law or Section 688(b).

The Louisiana law and Mexican law claims in this case do not conflict in any way with Section 688(b) since Section 688(b) relegates Petitioners solely to state and foreign law claims in United States courts by prohibiting causes of action under the Jones Act and general maritime law. Clearly, this is not a situation where United States maritime law precludes a certain remedy such as punitive damages, mental anguish, or loss of society damages and the state or foreign law conflicts with federal maritime law by providing such a remedy. *See e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1986); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624-625 (1978); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 214-15 (1996). To the contrary, because Section 688(b) precludes a Jones Act or general maritime claim altogether, Petitioners are closely situated to the plaintiff in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204, n. 2 (1996), who was neither a seaman covered by the Jones Act nor a longshore worker covered by the LSHWCA and therefore defined by this Court as a "nonseafarer." In *Yamaha*, this

Court held that such nonseafarers could pursue their state law claims and state law remedies in admiralty and rejected all arguments that such state law claims were preempted by federal maritime law. *Id.* at 214-15. The same analysis should apply in this case and Petitioners should be permitted to proceed with their state law and foreign law claims in United States courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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	*	C/W
VERSUS	*	NO. 96-CA-2702
J. RAY MCDERMOTT, S.A., ET AL.	*	COURT OF APPEAL
	*	FOURTH CIRCUIT
C/W	*	STATE OF LOUISIANA

MARIO ARTURO MARTINEZ, ET AL.

VERSUS

J. RAY MCDERMOTT, S.A., ET AL.

* * *

APPEAL FROM
CIVIL DISTRICT COURT,
FOR THE PARISH OF ORLEANS
NO. 95-16491 c/w 96-354, DIVISION "H"
HONORABLE MICHAEL G. BAGNERIS, JUDGE

* * *

MOON LANDRIEU
JUDGE

* * *

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ATTORNEYS FOR DEFENDANTS/APPELLEES
(GULF TECHNICAL SERVICES CORPORATION, CCC FABRICACIONES Y CONSTRUCCIONES, S.A. de C.V., CORPORACION de INDUSTRIALS Y CONSTRUCCIONES, S.A. de C.V.)

AFFIRMED

Appellants are citizens of Mexico. They are surviving crew-members and representatives of deceased crew-

members of the Derrick Lay Barge 269, which sank off the Yucatan Peninsula in the Bay of Campeche on October 15, 1993, during Hurricane Roxanne. Approximately 250 people were aboard as crew, including United States citizens and Louisiana residents. At the time the vessel sank, it was under tow by the M/V Captain John and the M/V North Carolina.

The appellants filed suit against a number of defendants, including two Panamanian companies with headquarters in New Orleans,[1] two Mexican corporations,[2] a Louisiana corporation, a Florida partnership, and a Texas corporation. The appellants sought damages under the Jones Act and general maritime law or, alternatively, under Louisiana law or other appropriate laws, namely the law of Mexico. The defendants filed exceptions of no cause of action and no right of action, and a motion to dismiss on the grounds of forum non conveniens, directed to the appellants.

By a judgment signed April 25, 1996, the district court denied the exception of no cause of action, but it maintained the exception of no right of action and dismissed the appellants' Jones Act and general maritime

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[1] McDermott International, Inc. and its subsidiary, J. Ray McDermott, S.A.

[2] CCC Fabricaciones Y Construcciones, S.A. de C.V., the owner and operator of DLB-269, and Corporacion de Industrias Y Construcciones, S.A. de C.V., the employer of the Mexican crew-members.

claims pursuant to 46 U.S.C. § 688(b).[3] The court reasoned that (1) the appellants were Mexican citizens and not

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[3] Section 688(b) provides:

(1) No action may be maintained under subsection (a) of this section [the Jones Act] or under any other maritime law of the United States for the maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred:

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

permanent resident aliens of the United States, (2) they were employed in an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources, (3) the enterprise was located on the outer continental shelf of a nation other than the United States, and (4) they had a remedy under Mexican law in Mexico. The appellants do not appeal that ruling.

The district court, however, delayed its ruling on the appellants' causes of action asserted under Louisiana law and Mexican law. On September 4, 1996, the district court maintained the exception of no right of action, dismissing the Louisiana law claims with prejudice and dismissing the Mexican law claims without prejudice to refiling them in Mexico. The appellants appeal this ruling.

The district court found that the Louisiana and Mexican law claims could proceed in this case only under the "saving to suitors" clause of 28 U.S.C. § 1333(1).[4] The district court reasoned, however, that the Louisiana and Mexican law claims did not satisfy the "saving to suitors" exception because such claims would directly contradict that body of law as defined by Congress in 46 U.S.C.

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[4] Section 1333 provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

An injured seaman may assert his Jones Act and general maritime claims in state court through the "saving to suitors" clause, which grants concurrent jurisdiction in maritime cases to the courts of the states. *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634, 637 (La. 1992).

§ 688(b). *See* n. 3, *supra*. The district court observed that the appellants could proceed with this action in Mexico.

The appellants assert the district court erroneously determined the scope and interpretation of 46 U.S.C. § 688(b). They maintain that the section does not reference and has no application (either expressly or implicitly) to claims asserted under state or foreign law. They further argue that the section is simply a statutory choice-of-law provision which limits the application of "American" law in certain cases involving foreign offshore oil exploration. The appellants contend Section 688(b) was not intended to preclude foreign seamen from asserting foreign and state law claims in the courts of the United States. They note that, even though the federal courts do not have subject matter jurisdiction to hear legal actions where at least one of the plaintiffs and one of the defendants are aliens, state courts do have such subject matter jurisdiction, subject to the authority to dismiss the action under the doctrine of forum non conveniens. The appellants emphatically point out that the common law doctrine of forum non conveniens has limited application in the courts of Louisiana.[5]

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[5] The device of forum non conveniens is a procedural rule of the common law. *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So. 2d 565 (La. App. 5th Cir.), *writ denied*, 488 So.2d 203 (La. 1986). Article 123 of the Louisiana Code of Civil Procedure sets forth the doctrine of forum non conveniens in Louisiana. The Article reads in part:

> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal

When it amended the Jones Act in 1982, Congress expressly eliminated a Jones Act remedy, as well as any other remedy under the general maritime law of the United States, to a foreign seaman employed in the offshore mineral extraction industry who is injured on waters overlying the outer continental shelf of a nation other than the United States, unless neither the country which had sovereignty over the outer continental shelf where the injury occurred nor the seaman's home country provides a remedy. 46 U.S.C. § 688(b). The purpose of the amendment was to protect United States companies active in the offshore oil and mineral extraction industry from the competitive disadvantage that may develop

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statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.

C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 U.S.C. § 688 or federal maritime law.

when foreign workers are allowed to forego the remedy available in their own or another country to pursue a claim in a court in the United States in the hope of availing themselves of either substantive or procedural advantages. *See* H.R.Rep. No. 97-863, at 2-4 (1982); *c.f. Vaz Borralho v. Keydril Co.*, 710 F.2d 207 (5th Cir. 1983). If we accept the appellants' proposition that a maritime tort claim barred by virtue of Section 688(b) may be entertained in any United States court under state or foreign law, the intent of Congress in amending the Jones Act in 1982 would be defeated. *See* 128 Cong. Rec. H7631-38 (daily ed. Sept. 28, 1982). We thus hold that the appellants have no Louisiana or Mexican law remedy in a Louisiana state court because the Jones Act and Congress's amendment thereof preempted any state or foreign law remedy that might have otherwise been available.

Commentators have opined that Section 688(b) effectively codified prior federal jurisprudence on choice of law, *see, e.g.*, Schoenbaum, Admiralty and Maritime Law, 2d ed., § 6-13 (1994); though, it did so with respect only to "certain alien" plaintiffs. 46 U.S.C. § 688(b). Because of the historical interplay between choice of law and forum non conveniens, *see, e.g., Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1378-79 (5th Cir. 1988), it has also been suggested, perhaps more correctly, that the provision was a codification of forum non conveniens as applied to certain foreign seamen. *See* Robertson & Speck, "Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions," 68 Tex. L. Rev. 937, 975, n. 56 (1990); *see also Vaz Borralho*, 710 F.2d at 209-10. Regardless of how one characterizes

Section 688(b), in the end, Congress clearly circumscribed the right of redress for certain foreign seamen.

The language upon which the instant challenge centers is the reference to "any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person." The "maritime law of the United States" signifies the "general maritime law of the United States." *See Camejo*, 838 F.2d at 1376-77.[6] "General maritime law" is a term of art which denotes federal, judge-made maritime law. *See* Schoenbaum, § 5-1.[7] By adding Section 688(b), Congress specifically and expressly prohibited certain foreign seamen from asserting claims under either the general maritime law or the Jones Act.

The appellants allege that the defendants were liable under the Louisiana law concept of negligence or under some Mexican law concept of negligence. However, this case meets the locality and maritime nexus criteria required for admiralty jurisdiction. *See Antill v. Public Grain Elevator*, 577 So. 2d 1039, 1040 (La. App. 4th Cir.),

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[6] The Fifth Circuit stated, "Section 688(b) denies a Jones Act remedy *and any other remedies under general maritime law* to foreign seamen in the offshore drilling industry when they are injured in another country's territorial waters, unless neither the country where the injury occurred nor the seaman's home country provide any remedy." *Camejo*, 838 F.2d at 1376-77 (emphasis supplied).

[7] "[T]he General Maritime Law (also known as the general maritime law – lower case!) of the United States is a branch of federal common law that furnishes the rule of decision in admiralty and maritime cases in the absence of preemptive legislation." Schoenbaum, § 5-1, p. 151.

writ denied, 581 So. 2d 684 (La. 1991) (citing *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *see also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995).[8] Therefore, federal substantive maritime law applies. *Id.* at 1042. To allow the appellants to proceed in state district court, bypassing the restriction on available remedies set forth by Congress and in the general maritime law, would effectively grant a right to certain foreign seamen not enjoyed even by a seaman

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[8] The Fifth Circuit summarized the *Grubart* criteria as follows:

> According to *Grubart*, the "connection" inquiry for admiralty tort jurisdiction involves two inquiries. A court must first "assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce." *Grubart*, 115 S.Ct. at 1048. . . . Second, a court must determine "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Id.* For this second inquiry, [the court] must ask "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the case at hand." 115 S.Ct. at 1051.

Coats v. Penrod Drilling Co., 61 F.3d 1113, 1118-19 (5th Cir. 1995). In *Coats*, the worker was injured while repairing and maintaining a jack-up rig in navigable waters. The court found that the activity giving rise to the accident had a sufficient connection to traditional maritime activity to support the exercise of admiralty tort jurisdiction.

who is a citizen or permanent resident alien of the United States.

Although the issue is res nova in Louisiana, a Texas appellate court, considering the interplay between that state's Open Forum Law and Section 688(b), reached the same conclusion in two published cases. In *Jackson v. S.P. Leasing Corp.*, 774 S.W.2d 673 (Tex. App. – Texarkana 1989, writ denied) (on motion for second rehearing), a Honduran seaman was injured aboard a tugboat engaged in the exploration, development and production of minerals and energy resources off the coast of Mexico. Jackson asserted claims under the Jones Act and Texas law. The defendant established that Jackson had a remedy under Honduran and Mexican law. In its second rehearing, the court of appeals stated that it had considered Jackson's amended petition and response to the motion for summary judgment which raised a Texas law claim. The court affirmed summary judgment on all of Jackson's claims. The court reasoned that, in Section 688(b), Congress manifested its intent to preempt state law in the area of injured foreign seamen. The court noted a conflict between the Texas Open Forum Act and the Jones Act.[9] The former appeared to allow Jackson to litigate his claim

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[9] In *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), the Texas Supreme Court, under the Texas Open Forum Act, Tex. Civ. Prac. & Rem.Code § 71.031, ruled that the doctrine of forum non conveniens had been statutorily abolished in Texas as to death and personal injury actions. Since then, the Texas legislature has provided a forum non conveniens procedure for cases filed after September 1, 1993. *See* Tex. Civ. Prac. & Rem. Code § 71.051: *see also 21 Int'l Holdings, Inc. v. Westinghouse*, 856 S.W.2d 479 (Tex. App. – San Antonio 1993, no writ).

in a Texas state court, whereas Section 688(b) denied a Jones Act remedy or any other remedy under the general maritime law to a foreign seaman in Jackson's circumstances. The court concluded that Jackson's remedies should be sought in Mexico and Honduras.

In *Lawrenson v. Global Marine, Inc.*, 869 S.W.2d 519 (Tex. App. – Texarkana 1993, writ denied), a British seaman assigned to the drill ship Glomar Adriatic I was injured on an offshore drilling platform located off the shore of Angola. Lawrenson asserted claims under the Jones Act and Texas law. The defendant established that Lawrenson had a remedy under British law. The court of appeals affirmed the grant of summary judgment. The court reasoned that when a seaman alleges negligence against an employer because of an injury during the course of his employment aboard ship, the state and common law causes of action are preempted by the federal maritime law, specifically the Jones Act. The court concluded that, under Section 688(b), Lawrenson could not bring his cause of action in a state or federal court of the United States because he had a remedy in England.[10]

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[10] In an unpublished case, another Texas appellate court reached the same conclusion. In *Stier v. Reading & Bates Corp.*, 1996 Tex. App LEXIS 3820 (Tex. App. – Houston [14th Dist.] August 29, 1996, n.w.h.), a German citizen and resident of Brazil was injured on a mobile offshore drilling vessel in the territorial waters of Trinidad. Steir asserted claims under the Jones Act, the general maritime law, Texas law, and the laws of Trinidad. The defendant successfully moved for summary judgment on the ground that Steir's claims were precluded and preempted by Section 688(b). On appeal, Steir abandoned his Jones Act and general maritime claims, but he continued to assert that his state law and foreign law claims were not precluded or preempted by

The cases upon which the appellants rely, including those from this Court, do not support their position. In *Smith v. ODECO, (U.K.), Inc.*, 615 So.2d 407 (La. App. 4th Cir. 1993), *writ denied*, 618 So. 2d 412 (La. 1993), a citizen of the United Kingdom was injured aboard a drilling rig engaged in the exploration and development of offshore energy resources in waters overlying the outer continental shelf off the coast of Spain. The Court, however, was not presented with the question whether Section 688(b) preempted the plaintiff's foreign law claim. The only issue was whether the plaintiff's claims were barred by prescription.

In *Pape v. ODECO, Inc.*, 93-1005 (La. App. 4th Cir. 9/21/94), 643 So. 2d 229, a British citizen was injured while working on an offshore drilling vessel in waters overlaying the continental shelf of the United Kingdom. Pape asserted claims under the Jones Act and general maritime law, as well as claims under Louisiana and Scottish and/or British law. This Court, however, was not called upon to decide whether Section 688(b) preempted Pape's Louisiana and foreign law claims.

In *Balashov v. Baltic Shipping Co.*, 96-1129 (La. App. 4th Cir. 1/22/97), 687 So.2d 1101, *writ denied*, 97-0487 (La. 4/18/97), 692 So. 2d 449, a Russian seaman was injured in Spanish waters aboard a Russian vessel. This Court did

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Section 688(b). The appellate court disagreed, holding that Section 688(b) precluded or preempted both state law and foreign law claims. The court stated, "To hold otherwise would be to defeat Congress's intent in amending the Jones Act, namely, to curtail forum shopping by foreign plaintiffs." *Id.*, pp. *5-*6.

not consider whether Section 688(b) precluded the assertion in a Louisiana court of a claim based on foreign law.

The appellants' argument that their suit under Louisiana and foreign law remains viable under the "saving to suitors" clause is without merit. They rely on *American Dredging Co. v. Miller*, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994). There, the Supreme Court held that, in admiralty cases filed in a state court under the Jones Act and the "saving to suitors" clause, federal law does not preempt state law regarding the doctrine of forum non conveniens. In *American Dredging*, the plaintiff was a Mississippi resident who was employed by a Pennsylvania corporation with its principal place of business in New Jersey and with a registered agent for service of process in New Orleans. Miller was injured on the Delaware river while in the course and scope of his employment upon a vessel owned by American Dredging. The Supreme Court reasoned that, in exercising *in personam* jurisdiction over maritime actions under the "saving to suitors" clause, a state court could adopt such remedies, and attach to them such incidents, as it sees fit, so long as those remedies do not "wor[k] material prejudice to the characteristic features of the general maritime law or interefer[e] with the proper harmony and uniformity of that law in its international and interstate relations." 114 S.Ct. at 985 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)). Noting that the doctrine of forum non conveniens "is nothing more or less than a supervening venue provision," 114 S.Ct. at 988, the Supreme Court concluded that the doctrine was neither a "characteristic feature," nor a doctrine whose

uniform application is necessary to maintain the "proper harmony" of maritime law. 114 S.Ct. at 985.

In this case, allowing the appellants' maritime tort claims, whether premised under state or foreign law, to proceed in state court would disrupt the "proper harmony" of maritime law as presently set forth in Section 688(b) and would materially prejudice the characteristics of the general maritime law. By amending Section 688(b) to bar Jones Act claims and any other maritime claims from foreign seamen in specific circumstances, Congress preempted the state law remedies which the appellants seek here. If the state court is forced to entertain state and foreign maritime tort claims from foreign seamen otherwise barred from bringing Jones Act and general maritime law claims, the characteristics of the general maritime law would be severely compromised. The district court correctly recognized this undesirable result in maintaining the defendants' exception of no right of action with regard to the appellants.

As the Louisiana Supreme Court has acknowledged, state law may only supplement general maritime law when there is "no applicable contrary federal legislation." *Green v. Industrial Helicopters, Inc.*, 593 So. 2d 634, 644 (La. 1992). In this case, federal legislation in the form of Section 688(b) precludes the appellants from asserting their maritime tort claims in Louisiana courts. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 95-16491 DIVISION "H"

ODILON CHACHA COTO; EDIBERTO HERNANDEZ HERNANDEZ; EMEDELIO HERNANDEZ TORRES; HECTOR RODRIGUEZ GAMAS; NELLI RODRIGUEZ OBANDO; JULIAN PEREZ FLORES; RUMAIDO MENDEZ VAZQUEZ; SAUL DIAZ ROMERO; SILVESTRE AVALAS AGUILAR; JORGE LOPEZ MEZA; MARIO SHORT ACOSTA; LUIS FELIPE TOACHE RUIZ; PEDRO A. RODRIANEZ BERZUNSA; and ALL OTHERS SIMILARLY SITUATED

VERSUS

J. RAY MCDERMOTT, S.A.,; MCDERMOTT INTERNATIONAL, INC.; THE AMERICAN BUREAU OF SHIPPING, INC.; CCC FABRIONES Y. CONSTRUCCIONES; CORPORIACION DE INDUSTRIASE CONSTRUCCIONES S.A. DE C.B. GEO-TECHNICAL SERVICES, INC.; NORTH BANK TOWING CORP.; and SEABULK OFFSHORE, LTD.

CONSOLIDATED WITH

NO. 96-354 DIVISION "H"

MARIO ARTURO MARTINEZ, JOSE ANTONIO VAZQUEZ MOTA, ALEJANDRO CANTON PERALTA AND CLAYTON HORSCHEL

VERSUS

J. RAY MCDERMOTT, S.A., ET AL.

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

The Exceptions of No Cause of Action, No Right of Action and to Dismiss the Petition on the Ground of *Forum Non Conveniens* filed by and on behalf of McDermott International, Inc., McDermott, Inc., J. Ray McDermott, S.A., and J. Ray McDermott, Inc. directed against the plaintiffs, Odilon Chacha Coto, Ediberto Hernandez Hernandez, Emedelio Hernandez Torres, Hector Rodriguez Gamas, Nelli Rodriguez Obando, Julian Perez Flores, Rumaido Mendez Vazquez, Saul Diaz Romero, Silvestre Avalas Aguilar, Jorge Lopez Meza, Mario Short Acosta, Luis Felipe Toache Ruiz, and Pedro A. Rodrianez Berzunsa, and the Exception of Improper Cumulation of Actions directed against the plaintiff, Shane Richins, in No. 95-16491 and the Exceptions of No Cause of Action, No Right of Action and to Dismiss the Petition on the Ground of *Forum Non Conveniens* filed on behalf of McDermott International, Inc., McDermott, Inc., J. Ray McDermott, S.A., J. Ray McDermott, Inc. and Offshore Petroleum Divers, Inc. and filed on behalf of Gulf Technical Services, Corporation, CCC Fabricaciones Y Construcciones S.A. De C.V. and Corporiacion De Industrias Y Construcciones, S.A. De C.V. directed against the plaintiffs, Mario Arturo Martinez, Jose Antonio Vazquez Mota and Alejandro Canton Paralta and the Exception of Improper Cumulation of Actions directed against Clayton Horschel in No. 96-354 came on for hearing on the 10th day of April, 1996 at 3:30 p.m.

Present: Randy J. Ungar and Charles B. Colvin, Randy J. Unger & Associates, Sam Palermo, O'Quinn, Kerensky & McAninch, attorneys for plaintiffs; Edward J. Koehl, Jr. and Michelle M.

O'Daniels, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P., attorneys for McDermott International, Inc., McDermott, Inc., J. Ray McDermott, S.A., J. Ray McDermott, Inc. and Offshore Petroleum Divers, Inc.; and George J. Fowler, III and Edward F. LeBreton, III, Rice Fowler, attorneys for Gulf Technical Services, Corporation, CCC Fabricaciones Y Construcciones S.A. De C.V. and Corporiacion De Industrias Y Construcciones, S.A. De C.V.

Having considered the law, the evidence, the pleadings and the argument of counsel,

IT IS ORDERED, ADJUDGED AND DECREED that the Exceptions of Improper Cumulation of Actions are ~~denied~~ [/s/ MB moot].

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Exceptions of No Cause of Action are denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Exceptions of No Right of Action are maintained dismissing the Jones Act and general maritime law claims of Odilon Chacha Coto, Ediberto Hernandez Hernandez, Emedelio Hernandez Torres, Hector Rodriguez Gamas, Nelli Rodriguez Obando, Julian Perez Flores, Rumaido Mendez Vazquez, Saul Diaz Romero, Silvestre Avalas Aguilar, Jorge Lopez Meza, Mario Short Acosta, Luis Felipe Toache Ruiz, and Pedro A. Rodrianez Berzunsa, Mario Arturo Martinez, Jose Antonio Vazquez Mota and Alejandro Canton Peralta, the Mexican National Plaintiffs, pursuant to Section b of the Jones Act, 46 U.S.C. § 688(b) for the reasons that (1) these Mexican National Plaintiffs are non-resident aliens; (2) they were

in the employ of an enterprise engaged in the exploration, development or production of offshore mineral or energy resources; (3) the enterprise was located on the Outer Continental Shelf of a nation other than the United States; and (4) they have a remedy under Mexican law in Mexico; and

IT IS FURTHER ORDERED that the issue of whether the Mexican National Plaintiffs have any action under Louisiana law or other (Mexican) law which may be pursued in this Court is taken under submission by the Court.

Judgment read, rendered and signed this 25th day of April, 1996.

/s/ Michael G. Bagneris
MICHAEL G. BAGNERIS,
CIVIL DISTRICT COURT JUDGE

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 95-16491 DIVISION "H" SECTION 12

ODILON CHACHA COTO, ET AL

VERSUS

J. RAY McDERMOTT, S.A., ET AL

consolidated with

NO. 96-354

MARIO ARTURO MARTINEZ, ET AL

VERSUS

J. RAY McDERMOTT, S.A. ET AL

JUDGMENT

On June 7, 1996, Defendants, McDermott, Inc., McDermott International, Inc., J. Ray McDermott, S.A., J. Ray McDermott, Inc., Offshore Petroleum Divers, Inc. and Insurance Company of North America, filed exceptions of no cause and no right of action, which were submitted on memoranda. On July 12, 1996, this Court heard oral arguments on Defendants' Exceptions of No Cause and No Right of Action with respect to Plaintiffs' claims asserted under Louisiana and/or Mexican law.

PRESENT:
RANDY J. UNGAR, MURRIE HERMAN,
SAM PALERMO, JOHN O'QUINN
Attorneys for Plaintiffs;

EDWARD J. KOEHL, JR.
Attorney for McDermott International, Inc., McDermott, Inc., J. Ray McDermott, S.A., J. Ray McDermott, Inc. and Offshore Petroleum Divers, Inc;

EDWARD F. LEBRETON, III
Attorney for Gulf Technical Services, Corporation, CCC Fabricaciones Y Construcciones S.A. De C.V. and Corporacion De Industrias Y Construcciones. S.A. De C.V.; and

JAMES O.M. WOMACK
Attorney for American Bureau of Shipping, Inc.

WHEN, after considering the memoranda submitted and the oral argument of counsel, the Court finding the law and argument to be in favor of Defendant, McDermott International, Inc., McDermott, Inc., J. Ray McDermott, S.A., J. Ray McDermott, Inc. and Offshore Petroleum Divers, Inc. (hereinafter Defendants), and against Plaintiffs, granting Defendants' exception of no right of action, for the following reasons:

This consolidated action involves various claims for personal injury allegedly sustained by certain U.S. and Mexican national members of the crew of the DLB-269 as a result of the sinking of the DLB-269 on navigable waters of the Gulf of Mexico off the Coast of Mexico during Hurricane Roxanne, on or about October 15, 1995. In paragraph 2 of their Petitions, Plaintiffs assert: "This is a claim brought in state court under the Jones Act and general maritime law, or alternatively under Louisiana law or other appropriate laws." In its April 25, 1996 Judgment, this Court maintained exceptions of No Right of Action upon the determination that Section (b) of the Jones Act, 46 U.S.C. § 688(b), is applicable to the claims

asserted on behalf of the Mexican national Plaintiffs; accordingly, the Court dismissed the claims of the Mexican national plaintiffs asserted pursuant to the Jones Act and general maritime law of the United States. The Court specifically reserved ruling on whether the Mexican national Plaintiffs had any right of action under "Louisiana law or other (Mexican) law."

The Court now concludes that the Mexican national Plaintiffs have no right of action under Louisiana law or under Mexican law in this court. The only way that the Mexican national Plaintiffs could proceed in this case would be under the "savings to suitors clause" of 28 U.S.C. § 1333(1), the jurisdictional source of the admiralty and general maritime law of the United States. The criteria to determine whether a particular remedy is "saved" to an admiralty litigant in a non-admiralty, state court are as follows: (1) the remedy must be one to which the litigant would otherwise be entitled under the law of the forum; and (2) the remedy must not alter or conflict with the maritime or admiralty law which establishes the substantive rights of the parties. *Hebert v. Diamond M. Co.*, 367 So. 2d 1210, 1215 (La. App. 1st Cir. 1978); *Pittman v. Port Allen Marine Services*, 794 F. Supp. 593, 599 (M.D. La. 1992). The Mexican national Plaintiffs fail to satisfy the necessary criteria to fall within the purview of the "savings to suitors clause".

Application of Louisiana law or Mexican law in this Court would not supplement general maritime law but would directly contradict that body of law as defined by Congress in § 688(b). Plaintiffs claim a right to maintain this action in state court because 46 U.S.C. § 688(b), by its terms, does not specifically preclude claims asserted

under Louisiana state law or Mexican law. However, Plaintiffs have not found a reliable state claim that satisfies the "savings to suitors" exception.

The two Fourth Circuit decisions relied upon by Plaintiffs are completely distinguishable from the instant matter. Plaintiffs' reliance on *Pape v. Odeco, Inc.*, 643 So.2d 229 (La. App. 4th Cir. 1994) is misplaced because the *Pape* decision made no definitive ruling as to whether the plaintiff in that case had any state law remedy. The *Smith v. Odeco (UK), Inc.*, 615 So. 2d 407 (La. App. 4th Cir.1993) ruling answers the question that Plaintiffs pose as to why the state is even mentioned in the statute. In that case, the Court allowed foreign nationals to proceed in a Louisiana court only after concluding that no other forum was available to the Plaintiffs. *Smith* made a specific finding that "through no fault of the plaintiff an alternative forum is not available." In the case at bar, it has already been concluded that the Mexican national Plaintiffs could proceed with this action in Mexico.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Exceptions of No Right of Action asserted on behalf of J. Ray McDermott, S.A., McDermott International, Inc., McDermott Inc., J. Ray McDermott, Inc., Offshore Petroleum Divers, Inc., Gulf Technical Services Corporation, CCC Fabricaciones Y Construcciones S.A. De C.V. and Corporacion De Industrias Y Construcciones, S.A. De C.V. are maintained dismissing the Louisiana law claims of Odilon Chacha Coto, Ediberto Hernandez Hernandez, Emedelio Hernandez Torres, Hector Rodriguez Gamas, Nelli Rodriguez Obando, Julian Perez Flores, Rumaido Mendez Vazquez, Saul Diaz Romero, Silvestre Avalas Aguilar, Jorge Lopez Meza,

Mario Short Acosta, Luis Felipe Toache Ruiz, Pedro Rodrianez Berzunsa, Mario Arturo Martinez, Jose Antonio Vazquez Mota and Alejandro Canton Peralta with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Exceptions of No Right of Action asserted on behalf of J. Ray McDermott, S.A., McDermott International, Inc., McDermott Inc., J. Ray McDermott, Inc., Offshore Petroleum Divers, Inc., Gulf Technical Services Corporation, CCC Fabricaciones Y Construcciones S.A. De C.V. and Corporacion De Industrias Y Construcciones, S.A. De C.V. are maintained dismissing the Mexican law claims of Odilon Chacha Coto, Ediberto Hernandez Hernandez, Emedelio Hernandez Torres, Hector Rodriguez Gamas, Nelli Rodriguez Obando, Julian Perez Flores, Rumaido Mendez Vazquez, Saul Diaz Romero, Silvestre Avalas Aguilar, Jorge Lopez Meza, Mario Short Acosta, Luis Felipe Toache Ruiz, Pedro A. Rodrianez Berzunsa, Mario Arturo Martinez, Jose Antonio Vazquez Moto and Alejandro Canton Peralta without prejudice as to any claims brought under Mexican law which may be brought in Mexico.

JUDGMENT READ, RENDERED AND SIGNED in New Orleans, Louisiana, on this the 4th day of September, 1996.

/s/ Michael Bagnens
JUDGE

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, APR 30 1998

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

ODILON CHACHA COTO, ET AL V. J. RAY MCDERMOTT, S.A., ET AL

No. 96-CA-2701 C/W 2702

Very Truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

The Supreme Court of the State of Louisiana

ODILON CHACHA COTO, ET AL

VS.

J. RAY MCDERMOTT, S.A., ET AL

CONSOLIDATED WITH

MARIO ARTURO MARTINEX, ET AL

VS. NO. 98-C-1443

J. RAY MCDERMOTT, S.A., ET AL

IN RE: Coto, Odilon Chacha; – Plaintiff[s]; Applying for Writ of Certiorari and/or Review; Parish of Orleans Civil District Court Div. "H" Number 95-16491, 96-354; to the Court of Appeal, Fourth Circuit, Number 96CA-2701, 96CA-2702

October 16, 1998

Denied.

JTK

CDK

BJJ

JPV

CDT

CALOGERO, C.J. would grant the writ.

MARCUS, J. not on panel.

LEMMON, J. would grant the writ.

Supreme Court of Louisiana
October 16, 1998

/s/ _____
Deputy Clerk of Court
For the Court

Supreme Court, U.S.
FILED
MAR 3 1999
CLERK

No. 98-1149

In The

Supreme Court of the United States

October Term, 1998

ODILON CHACHA COTO, ET AL.,

Petitioners,

versus

J. RAY McDERMOTT, S.A., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal For The Fourth Circuit Of The State Of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Fourth Circuit Court of Appeal for the State of Louisiana correctly decided that the 1982 amendments to the Jones Act, 46 App. U.S.C. § 688(b), preclude the Mexican National Petitioners from asserting their maritime tort claims under Louisiana and/or Mexican law in a Louisiana state court?

CERTIFICATE OF INTERESTED PARTIES

The Petitioners accurately list the parties to the proceeding.

In compliance with Rule 29.6, Respondents offer the following:

McDermott International, Inc. has no parent company. The following are non wholly-owned subsidiaries of McDermott International, Inc.; P.T. Babcock & Wilcox Indonesia; MacShelf Ltd.; J. Ray McDermott, S.A.

McDermott Inc.'s parent company is McDermott International, Inc. McDermott, Inc. does not have any non wholly-owned subsidiaries.

J. Ray McDermott, S.A.'s parent company is McDermott International, Inc. J. Ray McDermott, S.A. has the following non wholly-owned subsidiaries: McDermott Servicos de Construcao, Ltda.; P. T. Bataves Fabricators; Malmac Sdn.Bhd.; McDermott Abu Dhabi Offshore Construction; McDermott Arabia Company Limited; Initec, Astano y McDermott International, Inc., S.A.; Davy McDermott Limited.

J. Ray McDermott, Inc. (formerly OPI International, Inc.) has J. Ray McDermott Holdings, Inc. as its parent company. J. Ray McDermott, Inc. has the following non wholly-owned subsidiaries: WD 140 Platform LLC; TL Marine Sdn. Bhd.

Offshore Petroleum Divers, Inc.'s parent company is J. Ray McDermott, Inc. Offshore Petroleum Divers, Inc. does not have any wholly-owned subsidiaries and was dissolved on 21 August 1998.

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STATEMENT OF THE CASE

Pursuant to Rule 15 of the Rules of the Supreme Court, Respondents offer the following to correct erroneous factual assertions and/or misstatements in Petitioners' Statement of the Case. Petitioners, non-resident aliens and citizens of Mexico, filed suit in the Civil District Court for the Parish of Orleans, State of Louisiana in the *Coto* matter on November 2, 1995. The suit was to recover damages for personal injuries allegedly sustained as a result of the sinking of a Mexican flag vessel, the Derrick Lay Barge 269 ("DLB-269"), on October 15, 1995 near the Yucatan Peninsula in the Bay of Campeche, off the coast of Mexico. No wrongful death or survival claims were asserted.

At the time of the sinking, the Petitioners were all residents and citizens of Mexico and non-resident aliens with respect to the United States. Defendants in the original Petition included CCC Fabricaciones Y Construcciones, S.A. de C.V. ("CCC"), the owner and operator of the DLB-269, and Corporacion de Industrias Y Construcciones, S.A. de C.V. ("CIC"), the employer of the Mexican National Petitioners. Both CCC and CIC are Mexican corporations based in Mexico.

Also named as defendants were McDermott International, Inc. and its subsidiary, J. Ray McDermott, S.A., both Panamanian corporations. Contrary to Petitioners' suggestion, these McDermott entities neither owned nor operated the DLB-269; nor did they employ the Mexican National Petitioners. *See* Petitioners' Brief at A. 3, n.2.

McDermott, Inc., a Delaware corporation, is a subsidiary of McDermott International, Inc. J. Ray McDermott,

Inc., a Delaware corporation and subsidiary of J. Ray McDermott, S.A., had a 49% ownership interest in CCC at the time of the casualty. Offshore Petroleum Divers, Inc., a Delaware corporation, is a subsidiary of J. Ray McDermott, Inc., who was insured by Insurance Company of North America. None of the McDermott entities, including Offshore Petroleum Divers, Inc., owned or operated the DLB-269. Nor did any of these entities employ the Mexican National Petitioners.

Just prior to the casualty which forms the basis of the suit, the DLB-269 was operated by CCC in the Bay of Campeche on the Continental Shelf of Mexico, under a contract with Petroleos Mexicanos, the state-owned oil company of Mexico. The DLB-269 had been engaged in the construction of an offshore pipeline connecting offshore platforms to facilitate the exploration and development of oil and gas resources on the Mexican Outer Continental Shelf. Petitioners were employees of CIC, a Mexican corporation, which had contracted with CCC in Mexico to provide crew members for the operation of the DLB-269.

REASONS FOR DENYING THE WRIT

McDermott International, Inc., McDermott, Inc., J. Ray McDermott, S.A., J. Ray McDermott, Inc., Offshore Petroleum Divers, Inc., and the Insurance Company of North America (hereinafter referred to as "Respondents") respectfully submit that Petitioners' Writ of Certiorari does not warrant review under the considerations of Rule X of the Rules of the Supreme Court. Respondents first

note that Petitioners do not contest that Section (b) of the Jones Act, 46 App. U.S.C. § 688(b), applies to the facts and circumstances of this case; nor do Petitioners seek review of the dismissal, with prejudice, of their claims under the Jones Act or general maritime law. The only issue for which review is sought is whether the trial court and the Louisiana Fourth Circuit Court of Appeal properly applied § 688(b) to the maritime tort claims of the Mexican National Petitioners in dismissing any Louisiana law claims with prejudice and dismissing their Mexican law claims without prejudice.

The decision of the trial court, as affirmed by the Louisiana appellate court, does not warrant review under Rule X. The Louisiana Supreme Court's denial of review of the appellate court's decision did not decide "an important federal question in a way that conflicts with the decision of another state court of last resort or of any United States court of appeals."[1] Further, the trial court's

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[1] While this Court has not previously addressed whether § 688(b) precludes maintenance of a Louisiana law or foreign law claim in a Louisiana state court, this question does not represent a significant unresolved issue of law. The United States Congress resolved this issue in enacting § 688(b) as demonstrated by its legislative intent reviewed *infra*. Furthermore, a separate panel of the Louisiana Fourth Circuit Court of Appeal unanimously determined that § 688(b) precludes both state and foreign law claims in Louisiana courts by foreign offshore oil workers specifically covered by § 688(b). *Bolan v. Tidewater, Inc.*, 709 So.2d 1059 (La. Ct. App.), *writ denied*, 720 So.2d 1212 (La. 1998). Clearly, the decision of the Fourth Circuit Court of Appeal in this matter represents the appropriate and correct interpretation of 46 App. U.S.C. § 688(b). Accordingly, Petitioners' Writ of Certiorari should be denied.

decision, and the subsequent opinion by the Louisiana Fourth Circuit Court of Appeal, has not decided an important federal question in a way that conflicts with relevant decisions of this Court. The Jones Act legislation contained in § 688(b) establishes a uniform federal rule which is binding upon state courts through the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. As noted by the Louisiana fourth circuit, "[r]egardless of how one characterizes § 688(b), in the end, Congress clearly circumscribed the right of redress for certain foreign seamen." Petitioners' Brief at A. 8-9.

Petitioners' basic premise that § 688(b) of the Jones Act is procedural and not substantive, thus not binding on a Louisiana state court, is in error. Petitioners conveniently overlook their admission that § 688(b) takes away from certain foreign offshore oil workers an action for damages for injury or death under the Jones Act and the general maritime law. Undoubtedly, such a statute is substantive and not, as Petitioners contend, merely a procedural *forum non conveniens* doctrine. *See, e.g., Vaz Borralho v. Keydril Co.*, 710 F.2d 207 (5th Cir. 1983).

Despite Petitioners' attempts to create a "conflict" between the Louisiana fourth circuit's decision and this Court's rulings in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), and *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), the relevant decisions in the maritime arena by this Court actually support the lower courts' rulings. Additionally, as a matter of statutory construction, the lower courts' rulings that 46 App. U.S.C. § 688(b) operates to preclude certain seamen from asserting claims in courts of the United States, whether federal or state, are correct.

Finally, as a matter of maritime preemption 46 App. U.S.C. § 688(b), as a Congressionally enacted mandate, does not allow state courts to provide remedies in derogation to Congress's intent. The Petitioners' argument and cited authority to the contrary are inapposite to the issues at hand.

I. No Conflict With Relevant Supreme Court Decisions

The decisions of the trial court and the fourth circuit are not in conflict with *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), which did not involve the claim of a foreign offshore oil worker much less the application of § 688(b). Indeed, the principles recognized in *American Dredging* actually support the analysis of the trial court and the fourth circuit in interpreting § 688(b).

At bottom, *American Dredging* involved a conflict between "federal" procedural rules, i.e., *forum non conveniens*, and Louisiana's procedural rules regarding the absence of *forum non conveniens* in Louisiana state courts for maritime matters. This Court's ruling in *American Dredging* was predicated on the fact that the doctrine of *forum non conveniens* neither originated in admiralty nor had exclusive application in admiralty; therefore, Louisiana's refusal to apply *forum non conveniens* to maritime matters brought in state court did not work "material prejudice to [a] characteristic featur[e] of the general maritime law." *American Dredging*, 510 U.S. at 450 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917)) (alteration in original). Unlike the doctrine of *forum non conveniens*, § 688(b) of the Jones Act undoubtedly originated in admiralty and has exclusive application in

"admiralty" cases. *American Dredging*, 510 U.S. at 455 ("Foremost among [Congress's] enactments in the field of maritime torts is the Jones Act.") (citation omitted). Thus, if a Louisiana state court were to refuse to apply § 688(b)'s strictures, that would work "material prejudice" to a characteristic feature of the general maritime law as expressed in the Jones Act.

Petitioners' reliance on *American Dredging* hinges on their likening of § 688(b) to a *forum non conveniens* doctrine. As more fully discussed in Section II *infra*, § 688(b) is a substantive statute that takes away a right of action from certain foreign offshore oil workers injured in territorial waters of other countries. As the court in *American Dredging* noted,

> [w]hile there is an established and continuing tradition of federal common law making in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field. Foremost among those enactments in the field of maritime torts is the Jones Act, 46 U.S.C.App. § 688.
>
> That legislation, which establishes a uniform federal law that state as well as federal courts must apply to the determination of employer liability to seamen, incorporates by reference "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees." . . . More particularly, we have held that the Jones Act adopts the "uniformity of requirement" of the FELA, requiring state courts to apply a uniform federal law.

American Dredging, 510 U.S. at 455-56 (citations omitted).

Petitioners erroneously assert that § 688(b) does not achieve uniformity in the maritime context by ignoring the fact that § 688(b) applies only to the claims of foreign offshore oil workers who have a remedy in their country of origin or the country of injury. Petitioners' Brief at 15-16. By its clear terms, § 688(b) provides a uniform result to claims by foreign seamen injured in another country's territorial waters while engaged in oil or other energy production where a foreign remedy is available to that foreign seaman. The United States Fifth Circuit Court of Appeals recognized in *Vaz Borralho v. Keydril Co.*, 710 F.2d 207 (5th Cir. 1983) (*Vaz Borralho II*), that § 688(b) is "an attempt to establish a uniform approach to considering suits brought by foreign workers injured over the Outer Continental Shelf of a foreign nation." *Id.* at 210. Applicant's argument in this respect is completely without merit and ignores both the language of the statute and the legislative history surrounding the enactment of § 688(b) as discussed *infra*.

Nor is the decision of the trial court and the fourth circuit in conflict with *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). In *Calhoun*, the Court applied a state wrongful death statute to a maritime tort claim where Congress **had not** prescribed any remedy for the wrongful death of non-seafarers in territorial waters. The Court held that the judicially-created maritime wrongful death remedy of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1972), did not preempt application of state wrongful death statutes to accidents involving non-seamen in territorial waters. *Calhoun* is factually distinguishable in that the Mexican National Petitioners are seamen who were allegedly injured in the sinking of their vessel

on the high seas. Furthermore, in *Calhoun* there was no applicable statutory impediment to the application of state law since neither the Jones Act nor the Death On The High Seas Act, 46 App. U.S.C. § 761, applied.

Here the decision of the trial court and the fourth circuit is both consistent with and mandated by the recognition of Congress's role in crafting uniform rules relating to maritime matters. As recognized by the Court in *Calhoun*, "[w]hen Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided." *Id.* at 215. The result in *Calhoun* obtained precisely because the deceased was a non-seafarer injured in the territorial waters of Puerto Rico and was within a class of persons for which Congress had **not** prescribed a comprehensive "tort recovery regime." Here, through § 688(b) of the Jones Act, Congress has expressly provided a comprehensive tort recovery regime for seamen and those provisions must be uniformly applied, as recognized by the Louisiana lower courts.

Indeed, as stated by this Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990):

> [w]e no longer live in an era where seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to those legislative enactments for policy guidance. We may supplement these statutory remedies

> where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit [the Court's] actions.

Miles, 498 U.S. at 27. Thus, as Congress has spoken on this matter by way of the 1982 amendments to the Jones Act, that legislation controls.

More recently, the United States Court of Appeals for the Eleventh Circuit distinguished *Calhoun* in concluding that federal maritime law preempted Alabama law with respect to wrongful death claims which arose after a train derailed when a vessel's tow struck the railroad bridge support in state territorial waters. *In re Amtrak "Sunset Limited" Train Crash*, 121 F.3d 1421 (11th Cir. 1997), *cert. denied sub nom.*, ___ U.S. ___, 118 S.Ct. 1041 (1998). The Eleventh Circuit's analysis of *Yamaha* in the context of preemption is decisive:

> Thus, it is evident in *Yamaha* that the Court, while intent on protecting the state interests that were present in that particular case (a product liability action resulting from a recreational boating accident in territorial waters), was not concerned with overruling bedrock admiralty principles recognized in *Southern Pacific Company v. Jensen*, 244 U.S. 205, 215, 37 S.Ct. 524, 529, 61 L.Ed. 1086 (1917), where the Court held that state law must yield if it "works material prejudice to the characteristic features of the general maritime law or interferes with the

> proper harmony and uniformity of that law in its international and interstate relations." Indeed, since the birth of the *Jensen* doctrine in the early part of this century, the goals of uniformity and harmony in admiralty have survived to the present. *Yamaha*, by emphasizing these principles yet again, has affirmed their continuing vitality.

121 F.3d at 1424-25. As demonstrated by the legislative history giving rise to the enactment of § 688(b), Congress sought uniformity with respect to the treatment of the claims of foreign offshore oil workers in courts of the United States. Thus, there is no merit to Petitioners' contention that § 688(b) represents a procedural rule which state courts adjudicating maritime matters are free to ignore.

II. The Jones Act – Section 688(b)

In 1920 Congress enacted the Jones Act and created a cause of action for negligence against an employer in favor of a seaman injured in the course of his employment. 46 App. U.S.C. § 688. In 1982, Congress amended the Jones Act and removed that cause of action, as well as any remedy under "any other maritime law of the United States," from foreign offshore oil workers who had an available remedy either in their country of origin or the country where their injury occurred. 46 App. U.S.C. § 688(b). While Petitioners acknowledge that § 688(b) applies and excludes their Jones Act and general maritime law claims, they nevertheless take the inconsistent position that § 688(b) does not preclude an action under Louisiana law or Mexican law, which they may only

assert through the saving to suitors clause of 28 U.S.C. § 1333(1).[2]

Essentially, Petitioners argue that § 688(b) is no more than a "procedural" choice of law or *forum non conveniens* provision not binding upon a Louisiana state court under the authority of *American Dredging Co. v. Miller*, 510 U.S. 443 (1994). The fallacy of this argument is demonstrated by its logical extension: If § 688(b) is procedural in nature and not applicable in a Louisiana state court, then the Mexican Nationals would be entitled to assert Jones Act and general maritime law claims in the Louisiana action. This result could never be sanctioned for it violates not only the provisions of § 688(b) but also the Supremacy Clause of the United States Constitution. U. S. Const. art. VI, cl. 2.[3] Under any fair reading of the Jones Act, the

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[2] Louisiana substantive law would not even apply to the claims asserted by Petitioners. None of the Petitioners are Louisiana citizens and none of the events occurred in Louisiana. *See generally* La. Civ. Code Ann. arts. 3542-3547 (West 1999).

[3] As Petitioners concede that they have no Jones Act or general maritime law claim, they must acknowledge the fallacy of their argument. Accordingly, it is immaterial whether § 688(b) is considered procedural or substantive; it is no less binding on a Louisiana state court. Moreover, Louisiana courts view substantive legislation as statutes that either establish new rules, rights and duties or change existing ones. A procedural law is viewed as one that prescribes a method of enforcing a substantive right and relates only to the forum of the proceeding or the operation of the law. *Milstead v. Diamond M Offshore, Inc.*, 676 So.2d 89 (La. 1996); *Rousselle v. Plaquemines Parish School Board*, 633 So.2d 1235 (La. 1994); *Segura v. Frank*, 630 So.2d 714 (La. 1994). Obviously, § 688(b) is substantive in nature in that it takes away from foreign offshore oil workers any remedy under the Jones Act or the general maritime law.

conclusion is inescapable that § 688(b) is substantive in nature as defined by this Court's jurisprudence. *See, e.g., Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997) (recognizing that statute expanding remedies and granting new causes of action involved substantive rights of the parties and could not be applied retroactively); *Lindh v. Murphy*, 521 U.S. 320 (1997) (amendments to *habeas corpus* deemed substantive because the amendments "affect[ed] substantive entitlement to relief"); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (Scalia, J., concurring). In enacting the 1982 Amendments to the Jones Act, Congress recognized that § 688 is substantive in nature by only allowing for prospective application of newly-enacted § 688(b). Finally, even the authority cited by Petitioners in their brief concedes that § 688(b) is substantive in nature and binds the state court. David W. Robertson, *Admiralty and Maritime Litigation in State Court*, 55 La.L.Rev. 685, 729 and n.259 (1995).

Section 688(b) precludes any action to foreign offshore oil workers in any American court whether under Louisiana law or Mexican law as intended by Congress in enacting § 688(b). As the legislative history proves, the purpose of the 1982 Amendment was to establish a uniform rule to protect American companies in the offshore oil and mineral industry from the competitive disadvantage that arises when foreign workers are allowed to

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Certainly § 688(b) cannot be considered substantive with respect to the Jones Act and general maritime law claims but be viewed as procedural for purposes of state or foreign law claims.

forego the remedy available in their own country to pursue a claim in an American court in the hope of a larger recovery.[4] That purpose would be totally frustrated if a maritime tort claim barred by virtue of § 688(b) could be heard in any American court under the guise of state or foreign law.

As consistently emphasized by this Court, Congress's intent and the reasons which prompted Congress to enact the law are considerations in interpreting a statute. *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) ("It is not for us to so construe the Acts as to frustrate this clear-cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption."). The House Committee Report on § 688(b) states that its purpose is to establish **uniform rules** that would prevent the maintenance "in the courts of the U.S." of actions by foreign offshore seamen in the circumstances described in that section. *See* H.R. Rep. No. 863, 97th Cong., 2d Sess., at 2 (1982). In describing the purpose of this legislation, the House Committee specifically noted:

> The legislation addresses the situation where a foreign worker, injured in the territorial waters or over the continental shelf of a nation other than the United States, seeks legal relief in the courts of the U.S. The *legislation provides that a suit may not be maintained* in that situation under U.S. law unless the injured party has no remedy

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[4] *See* H.R. Rep. No. 863, 97th Cong., 2d Sess., at 3 (1982) ("Lawsuits brought by foreign offshore workers not only substantially increase the insurance and litigation costs of U.S. companies but may also increase court congestion.").

> in either his country of citizenship or nationality or the country exercising jurisdiction over the waters where the incident giving rise to the injury occurred.

H. R. Rep. No. 863, 97th Cong., 2d Sess., at 2 (1982) (emphasis added).

A review of the comments in Congress during the debates on § 688(b) establishes beyond question that "courts of the U.S." includes both state and federal courts. The legislative history establishes that foreign seamen were not intended to have any remedy, whether under federal law, state law, or foreign law, **in any American court** where a remedy was available in either their country or in the country having jurisdiction over the area where the accident occurred.[5]

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[5] The full intent of § 688(b) was described in detail by Congresswoman Boggs:

> I believe this legislation is important to the economic health of our offshore service industry. As many of my colleagues know, a number of offshore service companies are based in the New Orleans area. These companies operate throughout the world, in the Middle East, off the coasts of Nigeria, Mexico, and Indonesia, in Prudhoe Bay, Alaska, and in the North Sea, just to name some of the major areas.
>
> In recent years some of these companies have been plagued by numerous lawsuits filed by foreign offshore oil and gas workers for injuries occurring over the Continental Shelf of foreign nations for which remedies are available overseas. This has proved to be very costly to these companies and to the world energy effort.
>
> U.S. offshore service companies' costs are in the form of defending expensive lawsuits tried

In precluding foreign offshore oil workers from suing in **American** courts, which by its terms would include both federal and state courts, there can be no doubt that Congress intended § 688(b) to exclude not just Jones Act and general maritime law claims, but any claim in any American court. Nor can there be any doubt that Congress intended that foreign offshore plaintiffs must first pursue the available remedy in their own country and that the American court system would serve as a court of last resort **only** where plaintiffs have no remedy in their own country.[6]

> thousands of miles away from the place of the incident. *These cases should not be tried in American courts;* rather, they should be tried under the laws of the jurisdiction in which the incident occurred. This situation results in additional insurance costs since the U.S. companies also are subject to the work-related compensation scheme where they work – that is, in the foreign country – and the costs of settling or even losing lawsuits brought in U.S. courts by foreign nationals.
>
> Foreign companies operating in competition to our own industry are not subject to these same costs. Because they do not bear this same burden they are at a competitive advantage over U.S. industry. Unfortunately, these additional costs are pricing our companies out of the market when they bid for work overseas against foreign-owned businesses.

128 Cong. Rec. 25,426 (1982). Congresswoman Boggs believed that the bill was fair because it preserved an American remedy for American workers while foreign workers would have recourse to their own national courts or compensation systems.

[6] Advocating enactment of § 688(b), Congressman Breaux explained:

The report of the House Committee which considered the proposed amendment of § 688(b) was consistent with the views expressed by the Louisiana delegation. In asking for a yes vote on the Jones Act amendment, Congressman Tauzin pleaded:

> H.R. 4863 would make the clarification by establishing that the foreign employee may not obtain a remedy under U.S. laws for an injury sustained in a work-related incident which occurred overseas for which a remedy is available overseas. H.R. 4863 would not affect U.S. maritime laws as they may be applied to any U.S. worker, any seaman on a blue-water vessel, or anyone working over the U.S. Continental Shelf.

128 Cong. Rec. 25,427 (1982). Additional legislative history demonstrates Congress's clear intent not to allow this type of action to proceed in any court in this country. 128 Cong. Rec. 25,422-29 (1982).

That the remedy provided in the claimant's home country might not be as lucrative as tort recoveries in the

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> . . . It is quite simple. We are saying to foreign seamen who work for U.S. companies that if they are injured, that if they have a remedy in their own country, if they have a court remedy in their own country for the injury that they have received, that they have to first pursue that remedy in their own country. That is not a novel, unusual approach. It makes sense. It is logical. We are not telling them that they cannot have access to U.S. courts. They can have access to our courts if they have no remedy available in their own country.

128 Cong. Rec. 25,423 (1982).

United States was of no significance to Congress. Congress did not view this result as unfair because it afforded foreign offshore workers who allegedly sustained injury from an accident in foreign waters, such as the Mexican Nationals, the same remedies as their fellow countrymen:

> The legislation will place the offshore non-maritime worker in the same legal position as his shore side counterpart. There will be no unfairness to the offshore worker, since he can still bring suit in the place where he has chosen to live or work.[7]

H.R. Rep. No. 863, 97th Cong., 2d Sess., at 4 (1982).

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[7] The comments of Senator Long during the senate debate concerning the enactment of § 688(b) demonstrate that the Senate Committee was of the same view:

> The United States should not continue to export its remedies for foreign workers' work-related injury claims which arose in foreign waters. Since no other country allows its judicial system to be used by foreign citizens for incidents occurring within the jurisdiction of foreign nations, U.S. offshore service companies and their foreign subsidiaries are at a competitive disadvantage with their many foreign competitors.
>
> A reasonable solution is to clarify U.S. maritime tort laws to provide that a foreign worker engaged in mineral extraction activities in waters over the continental shelf of a foreign nation **may not seek a remedy for his work-related injury in U.S. courts** if he has a remedy in his home country, or in the country with jurisdiction over the accident site, if different. Should there be no remedy overseas, the foreign worker would then, and only then, be able to adjudicate his claims in U.S. courts.

128 Cong. Rec. 29,924 (1982). To level the playing field for U.S. offshore service companies and their foreign subsidiaries,

In establishing a uniform rule mandating dismissal of the claims of foreign offshore workers, Congress was prompted by its desire to clarify and codify the existing jurisprudence concerning choice of law and *forum non conveniens*. An understanding of the existing case law through 1982 with respect to choice of law and *forum non conveniens* concepts, as applied to suits brought on behalf of foreign offshore workers, is instructive as to the full extent to which § 688(b) is to be applied. To be certain, choice of law was then relevant only to *forum non conveniens*. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289 (5th Cir. 1984); *Sosa v. M/V LAGO IZABAL*, 736 F.2d 1028, 1031 (5th Cir. 1984). Indeed, a choice of law analysis was considered as the first prong of a *forum non conveniens* test. *Ali v. The Offshore Co.*, 753 F.2d 1327 (5th Cir. 1985).

In a line of cases beginning with *DeMateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978), and culminating in *Chiazor v. Transworld Drilling Company, Ltd.*, 648 F.2d 1015 (5th Cir. 1981), courts applying the *Lauritzen*[8] and *Rhoditis*[9] choice of law factors in the context of offshore exploration and development vessels located in foreign waters placed greater emphasis on

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Senator Long supported enactment of § 688(b) as designed to exclude all claims of foreign offshore workers from American courts. The view held by the Louisiana delegation was shared by the majority of members of Congress who addressed the issue. *See* 128 Cong. Rec. 25,422-29 (1982).

[8] *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

[9] *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

the allegiance and domicile of the injured worker and on the place of contract rather than on the ultimate ownership of the vessel through a subsidiary of a U.S. multinational corporation. The rationale of the *Chiazor* line of cases was based upon the factual distinction between traditional merchant vessels which sail to varying locations throughout the world as compared with vessels engaged in offshore oil and gas operations which are usually confined to one geographic region. In the *Chiazor* line of cases, the courts refused to apply U.S. law, including the Jones Act, and dismissed the claims of foreign offshore workers. *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015 (5th Cir. 1981); *DeMateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240 (3d Cir. 1980); *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980), *cert. denied sub nom.*, 451 U.S. 920 (1981); *Dos Santos v. Reading & Bates Drilling Co.*, 495 F. Supp. 843 (E.D.La. 1980). It cannot be disputed that Congress had the *Chiazor* line of cases in mind when it passed the amendment to the Jones Act in 1982. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). ("We assume that Congress is aware of existing law when it passes legislation.").

In *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983) (*Vaz Borralho I*), the Fifth Circuit approved the *forum non conveniens* dismissal of a wrongful death claim by survivors of a Brazilian seaman killed while working on a submersible drilling rig off the coast of Brazil; however, the court reversed and remanded for the fashioning of an appropriate conditional dismissal. In denying a petition for rehearing, the court reviewed the 1982 amendment of the Jones Act and concluded that Congress was well

aware of the existing case law when enacting § 688(b). *Vaz Borralho II*, 710 F.2d at 210-212. In fact, the Fifth Circuit observed that the language of the amendment and its legislative history were consistent with the rationale of *Chiazor*, which resulted in the dismissal of the foreign offshore workers' claims. *Id.*

The Fifth Circuit also observed that the 1982 amendment was broader in scope than the rationale of *Chiazor* and was to be uniformly applied on an industry wide basis. *Vaz Borralho II*, 710 F.2d at 209. In this respect, the court focused on the comments of Congressman Biaggi, the bill's sponsor, who stated:

> Most court decisions [*Chiazor*, et al.] have held that a foreign offshore worker injured on a foreign Continental Shelf should not bring his action in a U.S. court – unless he lacks a remedy in the host nation or his home nation. H. R. 4863 will codify this judicial precedent.

Id. at 211 (quoting 128 Cong. Rec. 25,422 (1982)). The court was further impressed with the comments of Congressman Snyder who noted that § 688(b) was "an attempt to establish a uniform approach to considering suits brought by foreign workers injured over the Outer Continental Shelf of a foreign nation." *Id.* (quoting 128 Cong. Rec. 25,423 (1982)).

Even without the ample evidence of legislative intent behind § 688(b), Petitioners' contention that § 688(b) permits dismissal of only the Jones Act and general maritime law claims defies the rules of statutory construction. Petitioners' argument focuses solely on the reference to the Jones Act and any other maritime law of the United States in § 688(b)(1), and fails to address the qualifying

language of § 688(b)(2) concerning the availability to the foreign offshore worker of a remedy in his home country or the country of injury. A basic rubric of statutory construction is that the statute's provisions must be read in *pari materia* so as not to achieve absurd results. *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 846 (1997) (statute must be read as a whole). When read as a whole, the statute clearly prohibits a foreign offshore worker from pursuing a remedy in American courts, whether federal or state court, when he has a remedy in his home country or the country of injury.[10] A contrary reading allowing the foreign seamen a right of action under state and/or foreign law would render § 688(b)(2)'s provision meaningless, for the availability of the foreign seaman's remedy would be irrelevant.

Additionally, Petitioners have no substantive right of action because of § 688(b). There can be no doubt that any tort claim by the Mexican Nationals as a result of the sinking of a vessel on navigable waters arises under and

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[10] *See, e.g., Jackson v. S.P. Leasing Corp.*, 774 S.W. 2d 673 (Tex. Ct. App. 1989); *Lawrenson v. Global Marine, Inc.*, 869 S.W. 2d 519 (Tex. Ct. App. 1993). As noted by Congressman Snyder:

> . . . this bill would require a foreign seaman injured while engaged in offshore drilling activity in waters of a foreign country to first pursue whatever legal remedy is available to him through the country in whose jurisdiction he was injured or in the country in which he is a citizen or resident before he comes to the U.S. judicial system. If there is a remedy to him through a foreign jurisdiction, then he is precluded from instituting an action in the U.S. courts.

128 Cong. Rec. 25,423 (1982).

is governed by substantive admiralty and general maritime law. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). A Jones Act seaman may assert a claim for damages in either federal or state court pursuant to the Jones Act. *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 63 (1943). Otherwise, a plaintiff, whose claims are cognizable in admiralty, may choose to bring suit in state court under the authority of the "saving to suitors clause" of 28 U.S.C. § 1333(1), the jurisdictional source of the admiralty and general maritime law of the United States. *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918). Generally, state courts exercising concurrent maritime jurisdiction are bound to apply substantive federal maritime statutory law. *Milstead v. Diamond M Offshore, Inc.*, 676 So.2d 89 (La. 1996).

As § 688(b) applies to the facts of this case, the Mexican Nationals may not maintain any action under the Jones Act "or under any other maritime law of the United States . . . for damages. . . . " 46 App. U.S.C. § 688(b). Since the "maritime law of the United States" encompasses the saving to suitors clause of 28 U.S.C. § 1333(1), *Bonnette v. Shell Offshore, Inc.*, 838 F. Supp. 1175, 1180 (S.D. Tex. 1993); Thomas J. Schoenbaum, ADMIRALTY & MARITIME LAW § 3-13, at 116-17 (1987), and since the Mexican Nationals are denied the right to invoke the saving to suitors clause by § 688(b), the Mexican Nationals have no right to maintain this action under Louisiana law or any other (Mexican) law in a Louisiana state court. In the final analysis, it is a common law

remedy (when not contrary to federal statutory or maritime law) which is saved, not a remedy in a common law court. *The Moses Taylor*, 71 U.S. 411, 397 (1866); *Wunderlich v. Netherlands Ins. Co.*, 125 F. Supp. 877 (S.D.N.Y. 1954); *Davis v. Matson Navigation Co.*, 143 F. Supp. 537 (N.D. Cal. 1956).

Even assuming that the saving to suitors clause is not barred by § 688(b), the criteria to determine whether a particular remedy is "saved" to an admiralty litigant in a non-admiralty, state court action are as follows: (1) the remedy must be one to which the litigant would otherwise be entitled under the law of the forum; and (2) the remedy must not alter or conflict with the maritime or admiralty law which establishes the substantive rights of the parties. *Pittman v. Port Allen Marine Services*, 794 F. Supp. 593, 599 (M.D. La. 1992). The state courts' ability to entertain *in personam* maritime causes of action is constrained by what is known as the "reverse-*Erie*" doctrine, which requires the substantive remedies offered by the state to **conform** to governing federal maritime standards. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986). In this context, application of Louisiana law or Mexican law would not supplement general maritime law but would directly contradict that body of law as defined by Congress in § 688(b). As directed by the Louisiana Supreme Court, a Louisiana state court should respect Louisiana law **unless** there is some federal impediment to application of that law **contained in federal legislation** or a clearly applicable rule in the general maritime law. *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634, 638 (La. 1992). Here, the impediment to the Mexican National Petitioners' right of action is contained

in the federal legislation of § 688(b) which excludes U.S. remedies to foreign offshore workers.

III. Maritime Preemption

Furthermore, the appropriate interplay between state law and federal law in maritime matters requires that the trial court's dismissal of the Mexican Nationals' state law and Mexican law claims, affirmed by the appellate court, be upheld. State law has always been inapplicable "if it contravenes the central purpose expressed by an Act of Congress [here, § 688(b)], or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *see also American Dredging Co. v. Miller*, 510 U.S. 443 (1994).

State law claims are preempted and not available to the Mexican Nationals where Congress has, by amending the Jones Act to exclude suits by foreign offshore oil workers, specifically proscribed any remedy. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207; *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). While state law may supplement federal maritime law where the maritime law is silent or where a local matter is at issue, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), here federal maritime law is not silent. Section 688(b) speaks loudly to this issue and it cannot be said that the sinking of the DLB-269 in Mexican waters or the resulting claims of Mexican Nationals may be considered a "local matter" to a Louisiana court.

Clearly, the Jones Act legislation contained in § 688(b) establishes a uniform federal rule which is binding upon state courts through the Supremacy Clause of the U.S. Constitution. U.S. Const. art. VI, cl. 2; *American Dredging*, 510 U.S. at 455. As previously noted, a Louisiana state court may not apply Louisiana law where there is a federal impediment to application of state law by virtue of federal legislation such as § 688(b) of the Jones Act. *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634, 638 (La. 1992).[11]

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[11] State courts in Texas have recognized the preemptive effect of § 688(b). *Jackson v. S.P. Leasing Corp.*, 774 S.W.2d 673, 678 (Tex. Ct. App. 1989); *Lawrenson v. Global Marine, Inc.*, 869 S.W.2d 519, 526 (Tex. Ct. App. 1993). In *Jackson*, the Texas appellate court affirmed dismissal of a personal injury claim of a foreign offshore worker injured aboard a vessel off the coast of Mexico. Finding that Jackson had a foreign remedy, the court affirmed dismissal of Jackson's Jones Act and Texas law claims. In denying Jackson's second motion for rehearing, the court specifically addressed the very issue raised herein by Petitioners:

> Here, federal law preempts state law because a conflict exists between the Texas Open Forum Act and the Jones Act. Whereas the Texas Open Forum Act appears to allow Jackson to litigate his claim in a Texas state court, 46 App. U.S.C. App. § 688(b) denies a Jones Act remedy and any other remedies under general maritime law to a foreign seaman in the offshore drilling industry when they are injured in another country's territorial waters, unless neither the country where the injury occurred nor the seaman's home country provides any remedy.

Jackson, 774 S.W.2d at 678.

Lawrenson involved the claim of a British offshore worker injured off the coast of Africa who asserted Jones Act and Texas

IV. Petitioners' Authorities Are Inapposite

Petitioners' Brief in support of the Petition for Writ of Certiorari is replete with authorities which are inapposite to the issue at hand. The authorities cited by Petitioners do not confront the issue of whether § 688(b) bars state or foreign law claims. Petitioners' reliance on *Camejo v. Ocean Drilling & Exploration Co.*, 838 F.2d 1374 (5th Cir. 1988), for the proposition that § 688(b) does not bar the foreign seaman's state law claims is misplaced. Specifically, the court in *Camejo* did not consider, nor was it presented, the issue of whether the 1982 amendments to the Jones Act contained in 46 App. U.S.C. § 688(b) operate to preclude a foreign seaman's state law claims. That the court proceeded to address the parties' arguments relative to *forum non conveniens* with respect to plaintiffs' Texas state law claims is of no moment and does not support Petitioners' assertion that § 688(b) does not bar their claims.

In a similar vein, the court in *Marriott v. Sedco Forex International Resources, Ltd.*, 827 F. Supp. 59 (D. Mass. 1993), did not "refuse" to reach the defendants' § 688(b) arguments. Rather, the issue under § 688(b) was not reached because the court ruled that the claims of the foreign seamen should be addressed under Indian substantive law. *Id.* at 67 n.10. Despite Petitioners' suggestion, nowhere in the *Marriott* opinion did the court

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law claims. Finding that Lawrenson had a foreign remedy, the Texas appellate court affirmed dismissal of his Jones Act and Texas law claims specifically holding that Lawrenson's state and common law causes of action were preempted by § 688(b) of the Jones Act. *Lawrenson*, 869 S.W. 2d at 524.

recognize that § 688(b) "was only intended to preclude the Jones Act remedy and not foreign substantive law claims." Petitioners' Brief at 10. The court in *Marriott* was not presented the issue of whether state or foreign law claims could be brought in state court.

Petitioners' erroneous argument that the court in *Cuevas v. Reading & Bates Corp.*, 577 F. Supp. 462 (S.D. Tex. 1983), *aff'd*, 770 F.2d 1371 (5th Cir. 1985), "concluded that the sole intent of the statute [§ 688(b)] was to preclude the application of the maritime law of the United States to certain claims asserted by foreign nationals," (Petitioners' Brief at 10) cannot be supported by any language in the court's opinion. Petitioners' assertion is noticeably lacking any citation, and the opinion makes no conclusion regarding the "sole intent of the statute." Indeed, within the opinion, the court recognized that § 688(b) signifies an expression of the national interest of the United States in refusing claims by foreign seamen. *Id.* at 469.

Finally, Petitioners' assertion that "[t]here are numerous cases which thoroughly discuss and correctly recognize that a court (federal or state) which is vested with admiralty jurisdiction will, in appropriate circumstances, apply foreign substantive law to adjudicate a plaintiff's claim," Petitioners' Brief at 12, is fatally flawed and is, at best, irrelevant. That flaw is that none of the cited cases involve the application of § 688(b). Each of these cited cases involve American plaintiffs and/or accidents occurring in American navigable waters. *Klinghoffer v. S.N.C. ACHILLE LAURO*, 937 F.2d 44 (2d Cir. 1991), involved claims against foreign entities by an American plaintiff. *Id.* at 46-47. Similarly, *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987), involved

the claims of an American seaman, *id.* at 1160; the same is true for *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166, 170 (3d Cir. 1995). *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995), involved claims by a United States citizen. *Id.* at 1120. Finally, *Sosa v. M/V LAGO IZABAL*, 736 F.2d 1028 (5th Cir. 1984), involved an accident occurring on the navigable waters of the United States. Thus, none of these cases deal with the claims of a foreign seaman or the application of 46 App. U.S.C. § 688(b). Respondents do not contest that there are situations where an American court, whether federal or state, will apply foreign substantive law in an action brought by an American plaintiff. Nothing in § 688(b) bars an American seaman from bringing a claim governed by foreign substantive law in an American court. Therefore, whether the court in these cases applied foreign substantive law to adjudicate a plaintiff's claim is irrelevant, as none of these plaintiffs were foreign seamen governed by § 688(b).

CONCLUSION

The Petitioners' remedies under Mexican law must be pursued in Mexico, the country of Petitioners' origin and the location of the accident giving rise to their claim, as provided by § 688(b). By denying the Mexican Nationals a right to bring an action under Mexican law through Louisiana law, both the trial court and appellate court gave effect to the purpose for which § 688 was enacted. The trial judge and the appellate court astutely recognized that state law may not stand as an obstacle to the accomplishment and execution of the full purposes and

objectives of an Act of Congress. *Boggs v. Boggs*, 520 U.S. 833 (1997) (citing *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 73 (1992)).

Petitioners are not aided by *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), for that decision did not involve a foreign seaman, much less a foreign offshore worker covered by § 688(b) and did not involve a conflict with a federal substantive provision of the Jones Act. The Court's decision in *American Dredging* actually supports a uniform and predictable application of § 688(b) to foreign offshore oil workers which would otherwise be unobtainable due to a court's discretion in analyzing a variety of *forum non conveniens* factors. Nor is there any merit to Petitioners' magical contention that the Mexican Nationals are somehow transformed by the wand of § 688(b) into non-seafarers who may now pursue state law remedies as allowed by *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). This contention defies logic, reason and reality; *Calhoun* merely allowed a state law death recovery to a non-seafarer killed in territorial waters where there was no federal statutory impediment. The remainder of Petitioners' authorities neither involve the application of § 688(b) nor address the issue of whether § 688(b) is a bar to state and foreign law claims of foreign offshore workers in the judicial system of the United States.

McDermott Respondents submit that the clear legislative intent which led to the amendment of the Jones Act through § 688(b) is that foreign offshore oil workers pursue their available foreign remedies in foreign courts; the language of § 688(b), when construed in its entirety, mandates that foreign offshore workers be denied access to

any American court whether damages are sought under the Jones Act, U.S. maritime law, state law or foreign law. Construing the statute in this manner is entirely consistent with the preemptive deference afforded Jones Act legislation. Petitioners' Writ of Certiorari is without merit and should be denied.

Respectfully submitted,

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